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EXAMINER

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3711

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 17

Application Number: 09/654,212
Filing Date: September 01, 2000
Appellant(s): CABOT, ANTHONY N.

Victor J. Gallo
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 07/29/02.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: on page 4, line 16 the statement "whether claims 24-32 are anticipated by Holmes" is not understood as no rejection of claims 24-32 (inclusive) as anticipated by Holmes "on a separate basis from one above" has been made in this application. Claims 27 and 28 are not rejected as being anticipated by Holmes. Claims 27 and 28 stand rejected as obvious under 35 U.S.C. 103.

(7) Grouping of Claims

The appellant's statement in the brief that certain claims do not stand or fall together is not understood. It is not clear how claims 24-32 can separately stand or fall together when appellant has already indicated that claims 1,2,4-6,21-26 and 29-32 stand or fall together.

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

6,220,959	Holmes, Jr. et al.	04-2001
5,704,835	Dietz, II	01-1998

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:
For the above reasons, it is believed that the rejections should be sustained.

Claims 1-2, 4-6, 21-26 and 29- 32 require the following and are rejected under 35 U.S.C. 102(e) as being anticipated by Holmes (U. S. Patent No. 6,220,959).

In order to determine whether application claims must be found unpatentable over the prior art, the terms and phrase used in the claims must read be read in light of the specification. This is necessary to establish whether the meaning of those terms and phrases given by the applicant in the context of the application should be accorded any meaning different from the usual and customary meaning of the claim terms. Here, it is submitted that when read in light of the specification the claim terms, such as "dealing", "NxN array", "determining", and "poker hand", must be given their ordinary and common

intrinsic dictionary definition. Accordingly, it is submitted that the claims may be read on the prior art in the following manner.

Holmes discloses:

- A method for playing a poker game (refer to Abstract);
- Dealing, face up, a NxN array of cards (Column 4, lines 35-38);
- Selecting none, some, or all of the cards to be held in the NxN array of cards of any said cards within said NxN array (In Column 2, lines 43-46, it is described that a player can select one card from each row to be held);
- Dealing new cards to replace unselected cards within said NxN array; and determining the poker hand rankings of predefined N card arrangements (Column 3, lines 13-16)
- NxN array of cards is a 5x5 array of cards (Fig. 1 and Column 3, lines 1-4);
- Placing a wager on at least one said N card arrangements (Column 3, lines 4-7);
- Paying the player according to a pay table (Column 7, lines 43-55);
- Poker game comprising 12 said N card arrangements as five vertical lines, five horizontal lines and two diagonal lines (Column 4, lines 11-18);
- Any said card is implicated in at least two N card arrangements of hands (refer to Fig. 1)
- Providing a 52 card deck for dealing and replacing said cards (Column 4, lines 48-52)

- Comparing each five card row and column group of cards to predefined poker rules to determine ten hand ranking (Column 6, line 1-18)
- Receiving a wager from a player for each row, column, or diagonal group of five cards prior to dealing said cards (Column 4, lines 19-21)

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 27 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Holmes in view of Dietz, II (U.S. patent No. 5,704,835)

Holmes discloses all of the invention as recited above when read in light of the instant specification, but fails to show wherein the NxN array of cards is a 3x3, further including three card diagonal groups of cards in said predefined N card arrangements and a game comprising allowing the purchase of said N card arrangements sequentially in a predetermined order. Dietz discloses a game where the NxN array of cards is a 3x3 (Column 3, lines 51-53). Dietz also discloses three card diagonal groups (refer Fig. 2). It would have been obvious in view of Dietz to one having ordinary skill in the art at the time the invention was made to change the 5x5 array of Holmes to 3x3 array as taught by Dietz in order to give players different options or to provide a simpler game.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Holmes. The possibilities of the 12 said N card arrangements disclosed by Holmes opens the

door for players to extend the complexity of the game to whatever levels they choose to play. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to purchase the 12 N card arrangements sequentially in a predetermined order to provide a more challenging game where the outcome (win or lose) becomes more difficult and therefore more satisfying.

(11) Response to Argument

Appellant's arguments filed on 07/29/02 have been fully considered but they are not persuasive.

Appellant argues that the Holmes reference fails to teach the method of selecting none, some, or all of the cards to be held in the NxN array of cards of any said cards within said NxN array.

However, to the contrary Holmes teaches the method of selecting none, some, or all of the cards to be held in the NxN array of cards of any said cards within said NxN array. This is explicitly described at Column 2, lines 43-46.

Appellant argues that Holmes does not describe where the duplicated cards and the replacement cards come from.

However, in column 4, lines 44-52 of Holmes it is discussed that the cards can be dealt from a single deck of cards or all of the cards can be dealt from two or more multiple decks of cards.

Appellant argues that the examiner provides no motivation, teaching or suggestion for the combination. However, the examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in

the art would be motivated to make the proposed combination of primary and secondary references. *In re Nomiya*, 184 USPQ 607 (CCPA 1975). However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole suggest to one of ordinary skill in the art. *In re McLaughlin*, 170 USPQ 209 (CCPA 1971). References are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures. *In re Bozek*, 163 USPQ 545 (CCPA, 1969). In this case, both Holmes and Dietz's references disclose electronic video game machines. Holmes discloses NxN array of cards is a 5x5 array of cards (Fig. 1 and Column 3, lines 1-4) and Dietz discloses a game where the NxN array of cards is a 3x3 (Column 3, lines 51-53). Dietz also discloses three card diagonal groups (refer Fig. 2). It would have been obvious in view of Dietz to one having ordinary skill in the art at the time the invention was made to change the 5x5 array of Holmes to 3x3 array as taught by Dietz in order to give players different options or to provide a simpler game.

Appellant argues that hindsight combination cannot form an obviousness refutation. The examiner agrees with this statement. However, it also must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Application/Control Number: 09/654,212
Art Unit: 3711

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Respectfully submitted,

March 26, 2003

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